Supreme Court, U.S.
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In The

Supreme Court of the United States

FREDERICK HARRIS, et al.,

Petitioners,

v.

WAYNE GARNER, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF OF PETITIONERS

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INTRODUCTION

Petitioners submit this reply brief to address misstatements of the record and the law in the State's *Brief in Opposition on Behalf of Respondents* (hereafter *"St. Br."*), and the *Brief for the United States* (hereafter *"U.S. Br."*).

I. CONTRARY TO THE CONTENTION OF THE UNITED STATES, PETITIONERS ARGUED IN THE COURT OF APPEALS THAT GEORGIA'S INMATE GRIEVANCE PROCEDURE VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND PETITIONERS' CASE PRESENTS THE DUE PROCESS ISSUE FOR REVIEW.

The United States contends that petitioners did not raise on appeal the question of whether the exhaustion requirement of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), violates the Due Process Clause of the Fourteenth Amendment where the prison grievance system imposes unreasonably short filing deadlines. *U.S. Br.* at 6. This is incorrect – petitioners clearly raised this due process argument on appeal. Specifically, in their opening Eleventh Circuit brief, petitioners argued:

> Brinkley's, Kilgore's, and Locklear's grievances were denied because they had not been filed within five days of the abuse they received on October 23, 1996.
>
> This harsh and impractical institutional rule should not be extended under § 1997e(a) to prohibit the filing of a civil rights lawsuit. In *McCarthy v. Madigan*, the Supreme Court rejected the federal prison system's attempt to

prohibit lawsuits by inmates who did not manage to comply with the 15-day, 20-day, and 30-day filing deadlines in its administrative remedy process. Such "short, successive filing deadlines," the Court stated, "counsel strongly against exhaustion as a prerequisite to the filing of a federal-court action." 503 U.S. at 152-53. Because the GDC's deadlines are even shorter, it is inconsistent with *McCarthy* to divest inmates who did not manage to grieve in time of their "most fundamental" right to file a court action. *Id.* at 153 (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)). The victims of officially sanctioned institutional abuse, such as the plaintiffs in this case, cannot constitutionally be denied their fundamental right to file a court action because of their failure to meet extremely short, successive deadlines – especially when all the evidence shows that no remedy is provided to even those inmates who manage to navigate the deadlines successfully. Permanent preclusion of plaintiffs' claims would amount to a violation of their constitutional right to "adequate, effective, and meaningful" access to the courts. *Bounds v. Smith*, 430 U.S. 817, 821-22 (1977); *see also Lewis v. Casey*, 518 U.S. 343, 351 (1996) (reaffirming that prisoners must be provided opportunity "to present claimed violations of fundamental constitutional rights to the courts").

Plaintiffs also have a protected property interest in their federal cause of action. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). Elimination of their interest on this basis would violate the Due Process Clause, as the GDC has not provided "constitutionally adequate procedures" in its system of administrative remedies. *See Cleveland Bd. of Educ. v. Loudermill*,

> 470 U.S. 532, 541 (1985). Five days is simply not enough time for a typical state prisoner to research his rights, obtain the proper forms, and then challenge in writing violent and systematic abuse administered against him by the prison agency's top officials. It is an insufficient "opportunity to present reasons." *Id.* at 546. Plaintiffs' interests in retaining their right to file court actions and the great risk of erroneous and arbitrary deprivation of those interests far outweigh the GDC's interest in maintaining its five- and four-day deadlines.

(*Brief of Appellants* at 24-26). Petitioners raised the due process problem again during oral argument.[1] The United States also argues that even if the due process had been raised on appeal, the issue is not presented under the facts of this case because the grievance procedure used by the Georgia Department of Corrections ("GDC") allows the Grievance Coordinator to "waive [the filing deadline] in appropriate cases for good cause shown." *U.S. Br.* at 6-7 (citing Georgia Dep't of Corr., Standard Operating Procedures, Reference No. IIB05-0001, para V.D.6 (Jan. 1, 1996)). The United States does not explain how this discretionary waiver provision disposes of petitioners' due

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[1] The State respondents contend that the Court should not review whether the PLRA's exhaustion requirement violates due process because "the issue was not decided by the courts below." *St. Br.* at 6. This argument finds no support in the law of this Court. Rather, the Court has stated repeatedly that it will decide questions that are raised *or* resolved in the lower courts. *See, e.g., Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court."); *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (same).

process argument. Furthermore, the Court has already rejected the substance of the government's contention.

In *McCarthy v. Madigan*, 503 U.S. 140, 152 (1992), the Court held that a prisoner bringing a Bivens action seeking money damages need not first exhaust the grievance procedure of the Federal Bureau of Prisons ("BOP"). The Court noted that the BOP's grievance procedure "imposes short, successive deadlines that create a high risk of forfeiture of a claim for failure to comply," and observed that these deadlines "are a likely trap for the inexperienced and unwary inmate, ordinarily indigent and unrepresented by counsel, with a substantial claim." *Id.* The Court's analysis was not altered by the fact that these deadlines could be extended for "valid" reasons: "[T]he regulations do not elaborate upon what a 'valid' reason is. Moreover, it appears that prison officials – perhaps the very officials subject to suit – are charged with determining what is a 'valid' reason." *Id.* at 153.

The dismissal of petitioners' case clearly presents due process problems. The GDC requires prisoners to file grievances within five days of the incident giving rise to the complaint. This five-day deadline is followed by a four-day deadline for appealing the decision of the Grievance Coordinator. As was the case in *McCarthy v. Madigan*, the GDC's Standard Operating Procedures do not explain what would constitute "good cause" for waiving the five-day deadline. Thus, Georgia's discretionary waiver provision does not make its otherwise procedurally inadequate grievance system fair and reasonable in accordance with the requirements of due process.

Moreover, three of the petitioners – Brinkley, Kilgore, and Locklear – filed grievances after the magistrate judge (and the district judge thereafter) dismissed their complaints without prejudice for failure to exhaust administrative remedies. In dismissing the complaint without prejudice, the magistrate and district court clearly presumed that, after their ruling, these plaintiffs would be able to seek administrative remedies regarding from the GDC, and the GDC would have an opportunity to review and resolve their complaints. Rather than address the complaints of these prisoners, however, the GDC denied all of them summarily for failure to comply with the GDC's unreasonable five-day filing deadline. *See Pet. Br.* at 11-13.

Because they could not surmount the nearly impossible five- and four-day successive filing deadlines required by the prison's grievance system, these petitioners are now permanently barred from pursuing relief in federal court for the systematic abuse they suffered at the hands of high-ranking prison officials. The Court should grant certiorari to determine whether the PLRA's exhaustion requirement violates the due process clause where the prison's administrative grievance procedure imposes such unreasonable and unnecessary burdens on prisoners.[2]

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[2] As the United States indicated in its brief, *U.S. Br.* at 6, the Court granted certiorari in *Booth v. Churner*, No. 99-1964, on October 30, to determine the scope of the PLRA's exhaustion provision when the remedy sought by the plaintiff is not available through the grievance system. Petitioners' case raises many of the same issues that the Court will likely address in deciding *Booth v. Churner*. One such issue is the heavy burdens

II. THERE IS A CLEAR CONFLICT AMONG THE OPINIONS OF THE COURTS OF APPEALS CONCERNING THE PROPER SCOPE AND APPLICATION OF 42 U.S.C. § 1997e(e).

The United States contends that there is no conflict between the decision of the court of appeals below and the courts' decisions in *Canell v. Lightner*, 143 F.3d 1210 (9th Cir. 1998), *Robinson v. Page*, 170 F.3d 747 (7th Cir. 1999), *Rowe v. Shake*, 196 F.3d 778 (7th Cir. 1999), and *Liner v. Goord*, 196 F.3d 132 (2d Cir. 1999). This is incorrect.

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placed on the individual interests of inmates seeking redress for constitutional violations, with very little corresponding benefit to the state or the courts.

In *Booth*, the prisoner was found not to have exhausted his administrative remedies because he failed to appeal the initial resolution of his grievance within the five days required by the state's administrative grievance procedure. In his brief to this Court, the *Booth* petitioner argues, as petitioners here argue, that § 1997e(a) presents a grave risk that prisoners will be permanently barred from seeking redress for violations of their federal constitutional rights because they miss one of a series of very short filing deadlines imposed on them by the prison grievance system. *See Booth v. Churner, Brief of Petitioner*, 2000 WL 1868095 at *33.

The amicus brief filed by the Legal Aid Society of New York, the American Civil Liberties Union, and the Prison Reform Advocacy Center on behalf of Booth, discusses at length the problem of short deadlines and "arcane" and "incomprehensible" grievance procedures. *See Booth v. Churner, Brief of Amici Curiae*, 2000 WL 1868111 at *12-30. These amici note correctly that procedural barriers "are especially problematic in connection with the prison population which is generally legally unsophisticated, poorly educated, and functionally illiterate." *Id.* at *13 & n.14.

The United States attempts to distinguish *Canell*, *Robinson*, and *Rowe* from petitioners' case by arguing that the plaintiffs in those cases "sought relief for violation of rights independent of any mental or emotional injury," and here petitioners are seeking relief for mental or emotional injury. *U.S. Br.* at 9-10. This distinction has no basis, as the court's reasoning in *Canell* demonstrates:

> [Plaintiff] is not asserting a claim for "mental or emotional injury." He is asserting a claim for a violation of his First Amendment rights. The deprivation of First Amendment rights entitles a plaintiff to judicial relief wholly aside from any physical injury he can show, or any mental or emotional injury he may have incurred. Therefore, § 1997e(e) does not apply to First Amendment Claims *regardless of the form of relief sought*. (Emphasis added).

Canell, 143 F.3d at 1213. Petitioners' claims are no different from those asserted in *Canell* for purposes of applying § 1997e(e). Petitioners, like the plaintiff in *Canell*, are entitled to judicial relief for violations of their right to bodily privacy wholly aside from any physical, mental, or emotional injury they can show. *See Fortner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir. 1993) (recognizing that prisoners retain fundamental right to bodily privacy which is violated by involuntary exposure of their genitals in the presence of people of the opposite sex). Thus, under the reasoning of *Canell*, § 1997e(e) should not bar petitioners' bodily privacy claims, regardless of the form of relief petitioners sought.[3]

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[3] Similarly, the United States contends that civil rights plaintiffs may obtain nominal and punitive damages when

The Court should grant certiorari to resolve this conflict in the decisions of the courts of appeals and settle an important federal question concerning the scope of 42 U.S.C. § 1997e(e).

CONCLUSION

For the foregoing reasons and for the reasons set forth in the *Petition for Writ of Certiorari*, the Court should grant review of the important issues presented by this case.

Respectfully submitted, this 17th day of January, 2001,

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"proof of a constitutional violation does not depend on proof of a mental or emotional injury." *U.S. Br.* at 12 n.4. Proof of a violation of bodily privacy does not depend on proof of mental or emotional injury any more than a violation of the First Amendment does. According to the reasoning of the United States, nominal and punitive damages should be available to petitioners.